(4)

Supreme Court, U.S.
FILED
NOV 20 1997
CLERK

No. 97-371

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

10pp

TABLE OF AUTHORITIES

Cases: Page

Advocates for the Arts v. *Thomson*, 532 F.2d 792 (1st Cir.), cert. denied, 429 U.S. 894 (1976) 3

Arizonans for Official English v. *Arizona*, 117 S. Ct. 1055 (1997) 4

Babbitt v. *Youpee*, 117 S. Ct. 727 (1997) 2

Board of Airport Comm'rs v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987) 6, 7

City of Lakewood v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) 6, 7

Piarowski v. *Illinois Community College*, 759 F.2d 625 (7th Cir.), cert. denied, 474 U.S. 1007 (1985) 3

R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 6

Rosenberger v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) 3, 5, 6

Rubin v. *Coors Brewing Co.*, 514 U.S. 476 (1995) 2

Rust v. *Sullivan*, 500 U.S. 173 (1991) 2, 5

United States v. *Gainey*, 380 U.S. 63 (1965) 2

United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 2

United States v. *Salerno*, 481 U.S. 739 (1987) 2

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 2

Constitution, statutes and rule:

U.S. Const. Amend. I 6, 7

National Foundation for the Arts and Humanities Act, § 5(d)(1), 20 U.S.C. 954(d)(1) 1, 2, 3, 4, 5, 8

Sup. Ct. R. 10 2

Miscellaneous:

R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (7th ed. 1993) 2

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-371

NATIONAL ENDOWMENT FOR THE ARTS, ET AL.,
PETITIONERS

v.

KAREN FINLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

We urge this Court to grant certiorari in this case because the court of appeals has declared Section 5(d)(1) of the National Foundation for the Arts and Humanities Act, 20 U.S.C. 954(d)(1), unconstitutional on its face and void in all of its applications. See Pet. 15-16. Respondents concede that the court of appeals' "decision to declare a federal statute unconstitutional is no doubt important." Br. in Opp. 9. They nevertheless contend that certiorari should be denied because (1) the court of appeals' decision has not generated a conflict among the courts of appeals (*id.* at 9-12); and (2) in their view, the court of appeals'

decision is correct on the merits (*id.* at 12-20). Those arguments are unpersuasive.

1. Respondents argue that no other court of appeals has specifically addressed the constitutionality of Section 5(d)(1) and that this Court "should therefore deny *certiorari* until and unless a genuine conflict emerges." Br. in Opp. 9. The existence of such a conflict is a pertinent consideration in the certiorari calculus, but it is not determinative. See Sup. Ct. R. 10. That is especially so here. The Court has consistently granted certiorari, without waiting for a conflict among the circuits, when the United States has sought review of a decision of a lower court declaring a federal statute unconstitutional. See, *e.g.*, *Babbitt* v. *Youpee*, 117 S. Ct. 727 (1997); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995); *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995); *United States* v. *Gainey*, 380 U.S. 63 (1965); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 185 (7th ed. 1993) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

The Court grants review in such circumstances for good reason. A lower court's decision to invalidate a congressional enactment, which expresses the majority's will in a democratic society, involves the most momentous application of judicial power. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991); *United States* v. *Salerno*, 481 U.S. 739 (1987); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). This Court has a heightened obligation "to review the exercise of th[at] grave power" (*Gainey*, 380 U.S. at 65) where, as in this case, the lower court

has declared an Act of Congress invalid on its face, thereby preventing the National Endowment for the Arts (NEA) from uniformly applying the Act in the context of a nationwide program. See Pet. 26-27. Respondents are accordingly mistaken in suggesting that this Court should postpone review until the courts of appeals are in square conflict over the constitutionality of Section 5(d)(1). There is a pressing need to resolve that question now.[1]

2. Respondents direct most of their arguments to the merits of the controversy. They contend that Section 5(d)(1): (a) is not subject to a limiting construction that avoids the constitutional challenge (Br. in Opp. 12-14); (b) necessarily results in viewpoint discrimination that is impermissible under this Court's decision in *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (Br. in Opp. 14-17); and (c) sets out unconstitutionally vague criteria for awarding grants (*id.* at 18-20). Those arguments in defense of the court of appeals' decision are unconvincing. But what is more important at the petition stage is that they highlight why

---

[1] We note that Judges Kleinfeld, O'Scannlain, and Kozinski concluded that the Ninth Circuit's decision in this case conflicts with the First Circuit's decision in *Advocates for the Arts* v. *Thomson*, 532 F.2d 792, cert. denied, 429 U.S. 894 (1976), and the Seventh Circuit's decision in *Piarowski* v. *Illinois Community College*, 759 F.2d 625, cert. denied, 474 U.S. 1007 (1985). See Pet. App. 30a-32a (Kleinfeld, J., dissenting); *id.* at 92a n.1 (O'Scannlain, J., dissenting from rehearing en banc). The First and Seventh Circuit decisions did not involve Section 5(d)(1), but they addressed closely analogous issues. The United States cited the tension between the Ninth Circuit's decision and those decisions as an *additional* reason why review is warranted. See Pet. 27-28.

this Court should grant the government's petition for review.

a. As we explain in the certiorari petition (at 16-18), the court of appeals created an unnecessary constitutional issue by construing Section 5(d)(1) to require that the NEA and its advisory panels "examine each grant application to determine if it comports with 'general standards of decency' and shows 'respect for diverse beliefs and values' as they subjectively understand these terms" (Pet. App. 17a), and automatically reject each application that does not. Respondents reply that the government merely disagrees "over the minutiae of precisely how 'decency and respect' are taken into account." Br. in Opp. 12. Not so. If—as the statutory text states—Section 5(d)(1) simply requires that the Chairperson "take[] into consideration" "general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. 954(d)(1), and if—as we urge—those factors can be "tak[en] into consideration" in the overall administration of the program without requiring that decision-makers impose viewpoint-based restrictions in particular grant decisions, Pet. 18-19, then Section 5(d)(1) raises no serious constitutional problems. The question whether Section 5(d)(1) is subject to such a limiting construction is, by itself, an important matter, included within the question presented, that warrants this Court's review. See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1074 (1997).

b. Even if the Court were to hold that the NEA must construe Section 5(d)(1) more expansively, the Constitution does not prohibit Congress from directing the Chairperson to take into consideration "general standards of decency" and "respect for the diverse beliefs and values of the American public" in awarding grants of public funds to support the arts. See Pet. 18-23. This case is controlled by the general principle, expressed in *Rust*, 500 U.S. at 193, that Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest." See Pet. 20-22. In accordance with that principle, Congress may direct that the NEA take into consideration (in conjunction with the criteria of artistic excellence and artistic merit) whether federally funded art will reflect "general standards of decency and respect for the diverse beliefs and values of the American public," without "discriminat[ing] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Rosenberger*, 515 U.S. at 834 (citation omitted). In contrast, respondents contend that Congress has engaged in impermissible viewpoint discrimination, essentially arguing, based on this Court's decision in *Rosenberger*, 515 U.S. at 830-831, that the NEA program simultaneously creates a public forum and discriminates against a "prohibited perspective." See Br. in Opp. 14-17.

We address the merits of respondents' contention, which reflects the reasoning of the court of appeals, in our petition. See Pet. 18-23. What is important, at this stage of the proceedings, is that respondents premise their argument on their construction of Section 5(d)(1), their characterization of the NEA program, and their perspective on the relationship between *Rust* and *Rosenberger*. Those premises are precisely the matters that sharply divided the en banc court of appeals and that this Court would examine in its review. The court of appeals was most seriously

divided on the question of the applicability of *Rosenberger*. Compare Pet. App. 22a-26a with *id.* at 32a-35a (Kleinfeld, J., dissenting) and *id.* at 94a (O'Scannlain, J., dissenting from the denial of rehearing en banc). The majority's application of *Rosenberger* in the context of a highly selective federal grant program, and in the context of criteria that are not viewpoint-suppressive in the sense *Rosenberger* discussed, is likely to have repercussions for a variety of other federal and state programs that subsidize expressive activities.[2] That issue therefore warrants resolution by this Court.

c. The court of appeals also erred in applying "void for vagueness" principles to the NEA grant program. Pet. 23-26. As we explain in the petition, this Court has never held that those principles, which the Court developed in cases involving direct regulation of speech, apply to congressional limitations on the receipt of federal funds under a selective grant program. Pet. 23-25. Respondents assert that "vagueness standards apply to the selective allocation of funding to communicative activities" (Br. in Opp. 18), but the cases they cite, *City of Lakewood* v. *Plain Dealer Publishing Company*, 486 U.S. 750 (1988), and *Board of Airport Commissioners* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), do not support that assertion.

---

[2] For example, respondents' assertion (Br. in Opp. 14-17) that consideration of "decency" necessarily constitutes discrimination on the basis of "viewpoint"—rather than a reference to aesthetic concepts or guideposts that concern the mode of expression of the art—greatly expands the scope of the term "viewpoint" beyond the distinctive meaning it has been accorded in First Amendment jurisprudence. See Pet. 18-20; *Rosenberger*, 515 U.S. at 828-830; *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 384-385, 388, 391-392, 393-394 (1992).

In *City of Lakewood*, the Court invalidated a city ordinance giving the mayor complete discretion over the decision whether to permit placement of newsracks on public sidewalks. 486 U.S. at 772. The Court ruled that the ordinance was invalid because it gave the mayor "unbridled discretion" to grant or deny licenses regulating the use of a traditional public forum. See *id.* at 755-759, 769-772. That case did not involve the conceptually distinct question of whether the First Amendment requires Congress to satisfy judicially imposed requirements of specificity when it establishes various criteria for the receipt of a government subsidy under a selective grant program involving expressive activity.

In *Board of Airport Commissioners*, the Court invalidated a resolution by the governing body of the Los Angeles International Airport banning all "First Amendment activities" within the "Central Terminal Area." 482 U.S. at 570-571, 577. The Court ruled that the resolution was "substantially overbroad" because it posed an absolute ban on all expressive activity and "no conceivable government interest would justify such an absolute prohibition of speech." *Id.* at 574-576. The Court rejected a proposal to construe the ban as limited to "expressive activity unrelated to airport-related purposes," noting that "the vagueness of this suggested construction itself presents serious constitutional difficulty." *Id.* at 576. Like *City of Lakewood*, the case involved direct government regulation of speech and not a government restriction on the use of federal funds.

The notion that the courts should apply First Amendment vagueness principles to government funding decisions is not only novel, but would lead to serious problems in practical application. For exam-

ple, respondents contend in this case that Section 5(d)(1)'s "artistic excellence" criterion has "objective content," but Section 5(d)(1)'s "decency and respect" criteria are "inescapably subjective." Br. in Opp. 19-20. That asserted distinction itself, however, merely reflects respondents' own subjective view about those criteria. By endorsing that distinction, the court of appeals has established a bold and problematic extension of the vagueness doctrine that warrants this Court's review.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997